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THE INCOME TAX CASES—A CORRECTION

Mr. Editor:

In the April, 1915, number of the Yale Law Journal appears an article entitled "Five to Four Constitutional Law Decisions." It purports to deal with all the decisions of the Supreme Court of the United States construing the Constitution, where the justices have divided, so that the question has been determined by a majority of one.

The writer of this lively and interesting paper appears inadvertently to have fallen into error when he treats of the *Income Tax Cases*, arising under the Act of 1894, namely, *Pollock v. Trust Company*¹ and *Hyde v. Trust Company*². The misstatement to which he has given currency calls for a prompt correction; otherwise, the authority of the Yale Law Journal is likely to be accepted as confirming what has heretofore been nothing more trustworthy than newspaper gossip.

The cases referred to, it will be remembered, were twice heard. The first hearing resulted in the decision of the Court that a tax on rents or income of real estate was a direct tax; and that a tax on income derived from the interest of bonds issued by a municipal corporation is a tax on the power and instrumentalities of a state to borrow money. Chief Justice Fuller delivered the opinion. Justices Harlan and White dissented. Upon other questions presented the Court announced that it was equally divided and so expressed no opinion.

Here I quote from the article (page 464):

"Upon a second hearing held before a full court, the entire law on May 20, 1895, was declared unconstitutional by a 'five to four' vote. There was one feature with relation to the vote of the justices on the second hearing of the case which calls for particular mention. Justice Brown, who had been absent at the first hearing, voted to sustain the constitutionality of the act, but Justice Shiras, who at the first hearing had supported the constitutionality of the act, at the second hearing, six weeks later, reversed his own opinion and by voting against the constitutionality of the act made the necessary 'fifth' vote to throw the

¹ 157 U. S. 586.

² 158 U. S. 651.

victory to that side of the controversy. The dissenting Justices in this case in addition to Justice Brown were Justices Harlan, Jackson and White."

Mr. Justice Brown was not absent from the first hearing. He was one of the six Justices who held the act unconstitutional, as respects tax on rent and income of real estate, and on the interest of municipal bonds. The Justices were Fuller, C. J., Field, Gray, Brewer, Brown and Shiras.

Mr. Justice Jackson, by reason of illness, did not hear the argument.³ It was Mr. Justice Jackson, and not Mr. Justice Brown, who was absent.

Mr. Justice Shiras did not reverse, at the second hearing, the vote which he had given at the first hearing. One of the Justices did so reverse his vote, but it was not Mr. Justice Shiras. Any one can ascertain who that Justice was by consulting the reports of the cases.⁴

You will, I know, Mr. Editor, be glad to give space for this correction. I feel sure also that the writer of "Five to Four" will thank me for calling attention to the inadvertence of accusing Mr. Justice Shiras of reversing his vote.

There is not the slightest doubt as to the fact. Were it necessary, I could make a further statement, confirmatory of what I have already said, which statement would be based upon information that came to me in 1900, from an authoritative source, in no wise connected with Mr. Justice Shiras. It is a pleasure to me to be able to set forth the truth as a measure of justice to the only living retired judge of the Supreme Court of the United State—a man who served his country ably and with the most scrupulous regard to the duties of his office.

FRANK WARREN HACKETT.

Washington, D. C.

³ 157 U. S. 2.

⁴ 157 U. S. 586; 158 U. S. 651.